forward in the court below that paragraph 15 does not use the words "received by the employee".

In referring to a passage in the learned judge's judgment that it would be highly unreasonable to ask an employee to pay tax when he had already had to suffer the fate of having to lose the means of doing so, the learned counsel submitted that the learned judge misapprehended his arguments in the court below, because at all times his submission was that income exempt from income tax was exempt whether in the hands of the employee or paid out by the employer. As regards the learned judge's hypothesis that revenue had the choice to exempt either the employer or the employee, counsel submitted that there was no discretion given to revenue. He finally submitted on the authority of *Secretary of State in Council of India* v. *Sir Andrew Scoble*,[8] that where the taxpayer is called upon to prove the negative the onus is on revenue to show what is taxable.

Considering all the arguments put forward on behalf of the appellants in support of this appeal, I think I am right in thinking that the case for the appellants rests substantially on the argument that income exempt from income tax is exempt both as income in the hands of the employee as well as a payment out by the employer. I do not think I can accept that argument, because in my judgment the fallacy in that argument lies in confusing income with outgoings. A payment made by an employer can be rightly called income for the employee. I do not see how it can be called income for the employer.

The general heading of paragraph 15 of Schedule 6 is "Exemptions from Tax" and part I is headed "Income which is exempt". Part II is headed "Exempt Institutions, Authorities, Persons and Funds". The whole of Schedule 6 therefore, speaks of exemptions from tax of "income". Reading section 127 in conjunction with paragraph 15 of Schedule 6, I do not think I can arrive at any conclusion other than that income in the nature of a payment made by an employer to an employee as compensation for loss of employment is exempt from income tax. As far as the employer is concerned the payment made by him is not his income. He can get what he pays to his employee deducted from his gross income for the purpose of assessment of his income tax only if that is a legitimate outgoing and expense wholly incurred in the production of his gross income as provided by law. It is clearly for this reason that both the Special Commissioners and the learned judge referred to section 33 of the Income Tax Act.

The Special Commissioners said in their case stated:

"In our opinion the fact that the Appellant was under an obligation to make the redundancy payments did not make the expenditure in this case an outgoing or expense wholly and exclusively incurred in the production of income for the purposes of section 33(1) of our Income Tax Act, 1967. And it must be finally observed that the said payment of the $26,023 to the workers was made in order to enable it to sell its rubber plantation and to terminate its business of rubber planting rather than to enable it to carry on that business and to produce income. We, therefore, found that the redundancy payment was not an outgoing or expense incurred by the Appellant in the production of income under section 33(1) of the Income Tax Act, 1967, and held that the said sum of $26,023 was not deductible in ascertaining its adjusted income for the year of assessment 1974."

That opinion of the Special Commissioners was accepted by the learned judge. I think all I need say is that both the Special Commissioners and the learned judge were right in arriving at their conclusions.

I would dismiss the appeal with costs.

Syed Othman F.J. and **Abdul Hamid J.** concurred.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

PALANIAPPA CHETTIAR v. LAKSHAMANAN CHETTIAR

[F.C. (Gill C.J. (Malaya), Syed Othman F.J. and Abdul Hamid J.) October 7, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 149 of 1977]

Hindu Law — Joint Hindu family — Property belonging to Joint Hindu Family transferred by Karta — Claim by other member of joint Hindu family.

The respondent had applied for a declaration that the transfer of a piece of land comprising an area of about 40 acres effected by one Arunasalam Chettiar (deceased) in favour of the appellant was void as against the respondent. The deceased Arunasalam Chettiar who was the Karta of a joint Hindu family had bought the land at a public auction from funds belonging to the joint Hindu family. The land was rubber land and as the Karta was already the owner of about 100 acres of rubber land and in order to avoid the rubber regulations which were applicable to owners of rubber estates of over 100 acres the Karta transferred the land to the appellant. Subsequently there were differences between the Karta and the appellant and the Karta claimed the return of the land. The Privy Council dismissed the Karta's claim on the ground that he had practised a deceit on the public administration (see [1962] M.L.J. 143). The respondent claimed that the decision of the Privy Council was not binding on him and claimed his one-third undivided share in the land. Ajaib Singh J. declared that the land was held by the appellant in trust for and on behalf of the joint Hindu family and that the land should be equally divided between the Karta, the appellant and the respondent. The appellant appealed.

Held: (1) under Hindu law where a member of a joint Hindu family governed by the Mitakshara law sells or mortgages more than his own interest in the joint Hindu family, the alienation not being one for legal necessity or for payment by a father of an antecedent debt, the other members or persons to whom their interest in the property have passed, are entitled to have the alienation set aside to the extent of their own interest therein;

(2) in this case the Karta had transferred the whole of the land to the appellant and the appellant was clearly not entitled to retain the one-third share which rightly belonged to the respondent as the third co-parcener;

(3) the appeal should be allowed to the extent that the reference in the declaration of the High Court to the Karta or his estate should be deleted and that the order be for payment out of the proceeds of sale of land of the respondent's one-third share.

Cases referred to:-

(1) *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121.

(2) *Chung Guat Hooi* v. *G.H. Goh* [1954] M.L.J. 131.

HIGH COURT.

Atma Singh Gill for the plaintiff.

N.A. Marjoribanks for the defendant.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff in this case seeks a declaration that the transfer of a piece of land held under Certificate of Title No. 4246 for Lot No. 926 in the Mukim of Si-Rusa in the District of Port Dickson comprising an area of 40 acres 2 roods 30 poles (hereinafter referred to as the 40 acres) effected by one PL. AR. Arunasalam Chettiar (deceased) in favour of the defendant on March 8, 1935 is void as against the plaintiff. He seeks a further order for a division of the 40 acres among himself, the defendant and the estate of Arunasalam Chettiar or a sale of the 40 acres by public auction and distribution of the proceeds among the three parties. The plaintiff also prays for an order that the defendant do render accounts of the income and expenditure arising out of the management of the 40 acres and to pay to the plaintiff his share.

In his statement of claim the plaintiff avers that Arunasalam Chettiar was the karta of a joint Hindu family of which the plaintiff and the defendant were coparceners. In 1934 Arunasalam Chettiar (hereinafter referred to as the karta) bought the 40 acres at a public auction from funds belonging to the joint Hindu family whereby the 40 acres became part of the family property. However as the karta was already the owner of about 100 acres of rubber estate and in order to avoid the rubber regulations which were applicable to owners of rubber estates of over 100 acres the karta transferred the 40 acres to the defendant on February 27, 1935 without any consideration whereby the defendant became the trustee of the 40 acres for the joint Hindu family. This transfer was registered on March 8, 1935. The plaintiff further avers that from the date of the transfer the karta retained control of the 40 acres and received income from it which was brought into the karta's accounts but that due to some misunderstanding between them the karta sued the defendant in Civil Suit No. 62 of 1950 for the return of the 40 acres. He was successful in the High Court as well as on appeal in the Supreme Court but upon further appeal to the Privy Council the karta's claim to the 40 acres failed on the ground that he had practised a deceit on the public administration. The 40 acres thus remained registered in the name of the defendant. The plaintiff avers that the decision of the Privy Council may or may not be binding on the karta and the defendant in so far as the karta's one-third undivided share in the 40 acres is concerned but that the decision is not binding on the plaintiff as the 40 acres belonged to the joint family of which the plaintiff was a coparcener.

In his defence the defendant denies that the 40 acres were part of the joint Hindu family property and he avers that the land had been sold to him by the karta for $7,000 on February 27, 1935 and thereafter the karta had no title whatsoever to the property. He states that the 40 acres now belong to him exclusively. The plaintiff is not a coparcener with the defendant in respect of the 40 acres and he is not entitled to any share in the land or in the income derived from the land. The defendant avers that he is not liable to render accounts to the plaintiff. The defendant further avers that the Privy Council had held that the karta was not entitled to contend that the transfer of the 40 acres to the defendant was fraudulent or ineffective and therefore the plaintiff is now prevented in law from raising the same issue again. In any event the defendant avers that the plaintiff is barred by the law of limitation from claiming any share in the land.

No evidence was adduced in this case and the parties rested their respective cases on the pleadings and the bundle of agreed documents which in fact is the appeal record in F.M. Civil Appeal No. 34 of 1958 arising from Civil Suit No. 62 of 1950 between the defendant as the appellant and the karta as the respondent. It was this appeal which eventually went up to the Privy Council in respect of the 40 acres.

There are several issues to be decided in this case. First whether the 40 acres were part of the joint family property or whether they were the separate property of the karta at the time of their transfer by the karta to the defendant. If the 40 acres were the separate property of the karta neither the plaintiff nor the joint family can have any claim to the 40 acres. Secondly if the 40 acres were part of the joint family property was the karta competent under Hindu law to alienate immovable property belonging to the joint family. Thirdly if the 40 acres belonged to the joint family is the plaintiff in the present proceedings bound by the decision of the Privy Council in Civil Suit No. 62 of 1950 between the defendant and the karta and lastly if the plaintiff is not so bound would the present suit be barred by the provisions of the Limitation Ordinance 1953.

Mr. Marjoribanks for the defendant submitted that the 40 acres were registered in the name of the karta at the time of the transfer to the defendant and it was for the plaintiff now to prove that the 40 acres were part of the joint Hindu family property. He said that no evidence had been adduced by the plaintiff to discharge this onus of proof but there was ample evidence on record to show that the karta always claimed the land to be his own separate property and that he transferred it in trust to the defendant to evade the provisions of the Rubber Regulations of 1934. In Civil Suit No. 62 of 1950 the karta sued the defendant in his private capacity and not in his capacity as the karta of the joint Hindu family. The karta in that suit had alleged that he transferred the 40 acres in trust and that the beneficial interest in the land was always vested in himself.

Mr. Marjoribanks conceded that in Civil Suit No. 62 of 1950 the defendant had pleaded that the 40 acres were the assets of the joint Hindu family. However this averment was rejected by the trial judge. When the karta bought the 40 acres in 1934 he entered the transaction in his own ledger and not in the ledger of the joint Hindu family. The karta had no intention of making a present to the defendant. The 40 acres were the karta's separate property capable of being dealt with as he chose and they were not the assets of the joint Hindu family of which he had no power of disposal.

Mr. Marjoribanks next submitted that if it was held that the 40 acres were assets of the joint Hindu family then the judgment of the Privy Council was binding on the plaintiff as being *res judicata*. Judgment against the karta was binding on the plaintiff

as a coparcener and although the karta may not have had the right under Hindu law to dispose of the 40 acres nevertheless he did so and the judgment was final. Lastly Mr. Marjoribanks submitted that if it was held that the 40 acres were assets of the joint Hindu family and that the Privy Council decision was not binding on the plaintiff then the plaintiff's claim was barred by limitation under section 9(1) of the Limitation Ordinance 1953. The plaintiff was a minor aged 6 years at the time of the transfer of the 40 acres by the karta to the defendant on March 8, 1935 and the plaintiff's right of action to have the transfer declared void as against him could have been brought when he was 21 years of age in 1950. Being a minor he would be given an extra 6 years within which to file his action by virtue of section 24(1) of the Limitation Ordinance which would bring the period to 1956 but the plaintiff did not file the action until January 4, 1974 which was about 18 years after 1956. Mr. Marjoribanks submitted that for the purpose of limitation time began to run from the date of any infringement or threat of infringement of the plaintiff's rights. He submitted that the plaintiff's rights were threatened when the transfer of the 40 acres was made in 1935 or when the defendant refused to retransfer the 40 acres to the karta who had then to file Civil Suit No. 62 of 1950 to recover the 40 acres.

Mr. Atma Singh Gill for the plaintiff submitted that the 40 acres belonged to the joint Hindu family and were not the separate property of the karta. He referred to the defence filed in Civil Suit No. 62 of 1950 wherein the defendant had made an admission that the 40 acres registered in the name of the karta were held in trust for the joint Hindu family in which the karta, the plaintiff and the defendant were coparceners. It was submitted that the Privy Council decision on appeal in that suit was not binding on the plaintiff and that the transfer of the 40 acres by the karta to the defendant in 1935 was invalid for not having been made for the benefit of the joint family. Mr. Atma Singh Gill submitted further that during the hearing of Civil Suit No. 62 of 1950 the parties had agreed to accept the decision of the Indian Courts on properties in Port Dickson which together with the family properties in India were the subject-matter of a suit between the same parties in India. The decision of the Supreme Court of India was made on October 25, 1963 declaring that the PL. AR. firm at Port Dickson was not the sole proprietorship of the karta but belonged to the joint Hindu family. On the question of limitation Mr. Atma Singh Gill submitted that the plea of limitation cannot succeed in this case by virtue of section 22(1)(b) of the Limitation Ordinance which provides that no period of limitation shall apply to an action by a beneficiary under a trust to recover trust property or the proceeds thereof in the possession of the trustee.

The background leading to the present suit may be stated briefly. The plaintiff and the defendant are the sons of the karta — the plaintiff by his second wife Meenakshi and the defendant by his first wife Lakshmi who died in 1922. Until about the year 1923 the karta was a member of his earlier joint Hindu family which was carrying on a money-lending business in Kuala Lumpur and Port Dickson in the name of K.M.P.L. firm. The accounts of the family business were maintained by the firm in these two towns with copies thereof sent to Kandanoor, India, where the accounts were entered in the family name of R.M.P.K.R. In the course of their business in Kuala Lumpur and Port Dickson the family acquired several immovable properties including rubber estates. In about the year 1923 a division of the joint family assets between the karta and his brothers commenced and on January 1, 1927 the karta obtained as his share of the assets in Port Dickson enums (outstandings) valued at $24,056, a house and some rubber estates valued at $96,000. The karta also took over liability for certain debts of the joint family and thereby his share in the assets of the Port Dickson firm was equalised. On August 22, 1926, even before the division of the family assets was completed, the karta started a money-lending business in the name of PL. AR. with the aid of funds withdrawn from the K.M.P.L. firm and other borrowings. On January 3, 1927 he brought into this business the enums, the house and the rubber estates as assets of the business. Copies of the day-book entries of PL. AR. firm were sent from Port Dickson to Kandanoor and duly entered in books maintained at Kandanoor. The defendant was residing at Kandanoor and attended to the postings of the entries and certain transactions in India relating to the Port Dickson business.

In 1949 the relations between the karta and the defendant were strained the karta having claimed that the PL. AR. business belonged to him exclusively. The defendant then filed a suit (O.S. No. 70 of 1950) against the karta, the plaintiff and Meenakshi in the Court of the Subordinate Judge at Devakottai, India. The suit finally ended up in the Supreme Court of India where it was held *inter alia* that the PL. AR. firm in Port Dickson and the assets thereof were the estate of the joint Hindu family consisting of the karta, the plaintiff, the defendant and Meenakshi and that the defendant was entitled to a third share therein. Shah J. in his judgment observed that with regard to the defendant's claim relating to his share in the assets of the PL. AR. firm in Port Dickson on the footing that it was a joint family business the court was faced with a preliminary difficulty in that the business was carried on in a foreign State, the assets of that business included immovables and by the rules of private International Law no claim may be maintained in a court in India for partition of immovables outside the jurisdiction. His Lordship said that the defendant had instituted a suit in the High Court at Seremban (No. 34 of 1951) for a declaration that the defendant had an interest in the PL. AR. firm in Port Dickson as a member of a joint Hindu family consisting of himself, the karta and the plaintiff and for partition of the assets of the joint family. In that suit it was agreed by the parties that they would abide by any final decree or decision of the courts in India on the issue arising in O.S. No. 70 of 1950 in the Court of the Subordinate Judge at Devakottai as to whether the PL. AR. firm at Port Dickson and the assets thereof belonged to a joint Hindu family as alleged by the defendant or were the separate property of the karta and the plaintiff as claimed by them. As a result of this agreement the Seremban High Court ordered that all further proceedings in Civil Suit No. 34 of 1951 be stayed

until the final determination of O.S. No. 70 of 1950 in the Indian Courts. Shah J. said —

"... Ordinarily the courts in India have, by the rules of private International Law, no authority to adjudicate upon title to immovable property situate outside India. But the defendants having agreed in Suit No. 34 of 1951 before the Supreme Court of the Federation of Malaya, the parties applied by C.M.P. No. 6218 of 1956 in the High Court at Madras that the issue relating to the title to the assets of the PL. AR. firm be decided. The High Court was therefore expressly invited by the parties to give a decision on the merits of the dispute in the light of the evidence led before the Trial Court and the High Court agreed to decide the disputed questions. Before us also, counsel for the parties have adopted the same attitude, and have asked us to decide the appeal on the merits, including the dispute as to title to immovables in Port Dickson."

In 1950 the karta filed Civil Suit No. 62 of 1950 in the High Court at Seremban against the defendant claiming a retransfer of the 40 acres to himself which he had transferred to the defendant in 1935. In his statement of claim the karta said that he was the registered owner of the 40 acres in Port Dickson which was cultivated with rubber and that on February 27, 1935 he transferred the 40 acres to his son the defendant in trust for himself. The defendant disputed the karta's claim denying that the karta had transferred the 40 acres to him in trust. He alleged that he in fact had purchased the 40 acres from the karta for a sum of $7,000 on February 27, 1935. The defendant also alleged in his statement of defence that before the date of the transfer the 40 acres were registered in the name of the karta but that they were held by the karta in trust for the joint Hindu family in which the karta, the defendant and the plaintiff were coparceners.

In his evidence in the High Court in Civil Suit No. 62 of 1950 the karta said that in 1934 he had bought the 40 acres at an auction for the sum of $8,081 and he produced what he described as his ledger in support. He said that about six months later he transferred the 40 acres to the defendant in order to avoid the rubber regulations then in force which were applicable to persons holding rubber estates of more than 100 acres. The karta said that when he bought the 40 acres he was already the owner of some 99 acres of rubber estate. He said that he had been receiving all the income from the 40 acres and had paid out the expenses. The defendant took no part of the income nor did he incur expenses. He said further that the 40 acres were not joint property but were his self-acquired property. All the property in Port Dickson he said was the subject-matter of litigation in India. (The record in the proceedings in Civil Suit No. 62 of 1950 disclose that the parties had agreed as they did in Civil Suit No. 34 of 1951 referred to in the judgment of Shah J. to accept the decision of the Indian Court).

The karta succeeded in his claim in Civil Suit No. 62 of 1950 in the High Court as well as on appeal to the Supreme Court of the Federation of Malaya. However on further appeal to the Privy Council (*Palaniappa Chettiar* v. *Arunasalam Chettiar* — [1962] A.C. 294; [1962] M.L.J. 143) it was held that the karta was not entitled to a retransfer of the 40 acres. The karta had practised a deceit on the public administration and applying the dictum of Lord Mansfield in the case of *Holman* v. *Johnson*[1] the Privy Council refused to "lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

Now to deal with the 40 acres in the present proceedings. After considering the evidence and the submissions made on behalf of the parties I have come to the conclusion that the plaintiff must succeed in this case. In my view there is ample evidence to establish that the 40 acres formed part of the assets of the joint Hindu family firm of PL. AR. and that they were not the separate property of the karta. When the karta commenced his money-lending business in the name of PL. AR. on August 22, 1926 he did so with funds withdrawn from the earlier joint family firm of K.M.P.L. which was then in the process of being partitioned and after the division of the movable and immovable properties the karta brought his share into the PL. AR. firm on January 3, 1927. The ledger which the karta had produced during the hearing of Civil Suit No. 62 of 1950 was the PL. AR. firm ledger. In that suit as well as in Civil Suit No. 34 of 1951 the parties had agreed to abide by the decision of the Supreme Court of India in O.S. 70 of 1950 and the Supreme Court had held that the PL. AR. firm in Port Dickson and the assets thereof were the estate of the joint Hindu family consisting of the defendant, the karta, the plaintiff and Meenakshi. In so far as the 40 acres are concerned the inferences which may be drawn from the facts as found by the Supreme Court conclusively establish that the 40 acres were assets of the joint Hindu family firm of PL. AR. and were not the separate property of the karta. In his judgment Shah J. said —

"In considering whether the business started by the first defendant (karta) at Port Dickson was of the joint family of himself and his sons, besides the fact that the business was of the same type as was originally carried on by the larger joint family in the name of K.M.P.L. and that it was commenced and consolidated with the aid of funds of the joint family of K.M.P.L. there are two other pieces of evidence which must be taken into consideration. Certain letters written by the first defendant (karta) to the plaintiff (defendant) who was at Kandanoor disclose the first defendant's (karta) attitude towards the PL. AR. business. Out of these letters one is of the year 1934 and the rest are of the year 1947 and onwards. In these letters the first defendant (karta) kept the plaintiff (defendant) informed about the dealings and transactions of the PL. AR. business, especially about the management of the rubber estates and has given diverse directions about entries to be posted in the headquarters account. In many of these letters the estate and the business are referred to as 'our business' and 'our estate'. Exhibit A-13 dated February 2, 1934 is a letter written by the first defendant (karta) to the plaintiff (defendant) with which were enclosed the copies of the day book of the PL. AR. firm transactions. In that letter directions were given by the first defendant (karta) about cashing certain hundis and making payment of certain debts. The plaintiff (defendant) has also been asked to receive a quantity of paddy from A.R.M. Ramaswami Mudaliar. In the letter Exhibit A-3 dated February 20, 1947 the first defendant (karta) wrote to the plaintiff (defendant) informing him that 'our estates are much overgrown with lalang (weeds). Only if they are removed, trees will grow well and rubber juice can be extracted'. He then bewails that large amounts will have to be expended for clearing the weeds and assures the plaintiff (defendant) that he will get the work done at a moderate expenditure. Directions have been given in that letter about certain payments to be made coupled with a request to attend to the prosecution of a suit pending in the Civil Court at Devakottai. In Exhibit A-2 dated March 29, 1947 there is a reference to the proposed institution of a suit in Malaya in which the costs were estimated at about 10,000 dollars. The plaintiff (defendant) is then informed by the first defendant (karta) that if rubber was extracted only from 'our estate', a sum of 200 dollars may have to be spent, but in view of the prevailing low prices of rubber it was not

desirable to do so. The first defendant (karta) then writes that it would not be 'beneficial to extract the rubber after removing the weeds' and proceeds to say that 'we might even purchase other estates if we liked, we did not want to clear our other estates'. The first defendant (karta) also informed the plaintiff (defendant) that he desired to sell away the business and to receive as much as possible as soon as the moratorium was removed. In the letter Exhibit A-4 dated April 22, 1947, he is bewailing the considerable expenditure required to be incurred for weeding and pruning the rubber estates. He has also informed the plaintiff (defendant) that arrangements were being made for borrowing a loan of 5,000 Malayan dollars from a Chinese money-lender and if that were obtained, he would get the wild shrubs and weeds removed and retain the balance for necessary expenses and even send a part of it to India. Similarly in letter Exhibit A-5 dated June 1, 1947 with which the copies of the day books from February to May 1947 were enclosed the plaintiff (defendant) was informed that if the accounts were looked into 'the money we are getting, can be seen'. He has further stated that there was great financial stringency in Malaya and it was not possible to borrow loans. There is also a note at the end of the letter in which it is stated 'We cannot own and manage estates hereafter'. In letter Exhibit A-6 dated July 4, 1947 there was also a reference to some financial transactions and the refusal of the Chinese money-lender to advance monies and to some petition for payment of compensation for loss sustained in 40 acres of rubber estate. The other letters proceed in the same vein: it is not necessary to set out in detail the contents thereof. It is sufficient to observe that the contents of the letters indicate a clear admission that the plaintiff (defendant) was interested in the business carried on in Malaya. The business and the estate were frequently referred to as 'our business' and 'our estate', whereas in respect of matters which were personal to the first defendant (karta) the first person singular was used."

The 40 acres of rubber estate referred to in the above passage are the 40 acres in the present suit. It is quite clear from the findings by the Supreme Court of India that the karta had throughout regarded the rubber estates as belonging to the joint Hindu family firm of PL. AR. and that the defendant knew about this as he was being kept informed of the dealings of the firm in Port Dickson by the karta. The karta of a joint Hindu family has the power to alienate property belonging to the joint family for valuable consideration but he may do so only for the purpose of legal necessity or for the benefit of the estate. The 40 acres in the present case were transferred by the karta to the defendant not for the purpose of legal necessity or for the benefit of the estate but were transferred solely for the purpose of avoiding the prevailing rubber regulations. The trial judge in Civil Suit No. 62 of 1950 had accepted the evidence of the karta that he "had no intention of making a present to my son. The sole object was to avoid having to disclose that I held more than 100 acres of rubber land". In the memorandum of transfer the karta had acknowledged that the defendant had paid him $7,000 for the 40 acres but as the trial judge had found the defendant had in fact paid nothing and this finding of the trial court was accepted in the Privy Council. The 40 acres transferred by the karta to the defendant in 1935 were thus held by the defendant only in name and he is deemed in law to have held them in trust for his joint Hindu family.

I think it is pertinent also to point out that the defendant's stand here is diametrically opposite to his stand in Civil Suit No. 62 of 1950. He now avers that at the time when the karta transferred the 40 acres to him in 1935 they were the separate property of the karta and not part of the assets of the joint family firm of PL. AR. whereas in his statement of defence in Civil Suit No. 62 of 1950 which was filed against him by the karta for a retransfer of the 40 acres the defendant stated that the 40 acres were held by the karta in trust for the joint Hindu family in which the karta, the plaintiff and the defendant were coparceners. The averment in Civil Suit No. 62 of 1950 is a clear admission by the defendant that the 40 acres belonged to the joint Hindu family and in my view the evidence in the proceedings before me strongly supports this contention.

I am also of the view that the Privy Council decision in the case of *Palaniappa Chettiar* v. *Arunasalam Chettiar, supra,* cannot operate as *res judicata* against the plaintiff and that the decision is not binding upon him. The plaintiff was not in any way concerned in the Privy Council case where it was held that the karta was not entitled to a retransfer of the 40 acres to himself because he had based his claim on an illegal act namely that he had practised a deceit on the public administration. The doctrine of *res judicata* operates where the parties are the same or are persons claiming under them and where the issues between them are the same or substantially the same as those in the first proceedings. The doctrine does not operate where the issues in the second proceedings are different. (see the case of *Chung Guat Hooi* v. *G. H. Goh*[2]). The issues in the present case are certainly not the same or substantially the same as in the Privy Council case. There the karta alleged that he was the beneficial owner of the 40 acres and that they were being held by the defendant in trust for himself. And the defendant claimed that the 40 acres belonged to him as he had bought them from the karta for valuable consideration. However in the present case the plaintiff claims that the 40 acres are held in trust by the defendant for the joint Hindu family and that they be brought in for distribution among the beneficiaries in the joint family. The Privy Council has in no way adjudicated upon the question of any right to the 40 acres by the joint Hindu family of PL. AR. In the circumstances I hold that the Privy Council decision cannot operate as *res judicata* against the plaintiff or against the joint family.

On the issue of limitation I agree with Mr. Atma Singh Gill that this being an action by a beneficiary to recover trust property from a trustee no period of limitation can apply to it by virtue of the provisions of section 22(1)(b) of the Limitation Ordinance 1953 which states that

"No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action ... to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

The plaintiff's first prayer at the end of his statement of claim is for a declaration that the transfer of the 40 acres by the karta to the defendant is void as against the plaintiff. Secondly the plaintiff seeks an order for the division of the 40 acres or a sale of the land and distribution of the proceeds among the coparceners. I am afraid I do not quite appreciate the first prayer for it seems to me to be somewhat out of tune with the plaintiff's averments in the statement of claim. I do not consider it appropriate nor do I think that there is any evidence to make an order in terms of the first prayer. Declaring the transfer

void will take the plaintiff nowhere. What the plaintiff really wants according to his averments in the statement of claim is a declaration that the defendant holds the 40 acres in trust for the joint Hindu family and in terms of the second prayer that the 40 acres be brought into the family property for distribution.

In the circumstances therefore I hold and declare that the 40 acres registered in the name of the defendant are held in trust by him for and on behalf of the joint Hindu family consisting of the plaintiff, the defendant and Meenakshi and consisting also of the karta until his death. I further order that the 40 acres be brought into the joint Hindu family and divided equally between the plaintiff, the defendant and the karta as coparceners or that the 40 acres be sold by public auction and the proceeds thereof distributed equally among the three coparceners. The one-third share of the deceased karta is to be added as an asset of the karta' estate. I also order that the defendant shall render accounts of the income and expenditure arising out of his management of the 40 acres and that an inquiry into the accounts be held by the Senior Assistant Registrar. Costs of the proceedings to be paid by the defendant to the plaintiff.

From the above judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

A.D. Rajah for the appellant.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Gill C.J. (Malaya): This is an appeal by the defendant in Civil Suit No. 4 of 1974 in the High Court at Seremban, AR. PL. Palaniappa Chettiar, from a judgment of Ajaib Singh J. whereby it was declared that the land held under Certificate of Title No. 4246 for Lot No. 916 in the Mukim of Si-Rusa in the District of Port Dickson in the State of Negri Sembilan comprising of 40 acres 2 roods 30 poles registered in the name of the defendant is held by him in trust for and on behalf of the joint Hindu family consisting of himself, A.R. Lakshmanan Chettiar alias PL. AR. Letchumanan Chettiar alias Ana Runa Leyna Lakshmanan Chettiar (the plaintiff) and Meenakshi and consisting also of the Karta named PL. AR. Arunasalam Chettiar until his death on August 19, 1972, following which declaration the consequential orders made were (a) that the 40 acres be brought into the joint Hindu family and divided equally between the plaintiff, the defendant and karta as coparceners, (b) that the 40 acres be sold by public auction and the proceeds thereof be distributed equally among the three coparceners, (c) that the one-third share of the deceased karta be added as an asset to Karta's Estate, (d) that the defendant do render accounts of the income and expenditure arising out of his management of the 40 acres, and (e) that an enquiry into the accounts be held by the Senior Assistant Registrar of the court.

Until about the year 1923 Arunasalam Chettiar was a member of an earlier joint Hindu family which was carrying on a moneylending business in Kuala Lumpur and Port Dickson in the name of K.M.P.L. Firm. In or about that year a division of the joint Hindu family assets of that firm between the Karta and his brothers commenced. But even before the division was completed Arunasalam Chettiar started a moneylending business in the firm name of PL. AR. on August 27, 1926. On January 3, 1927 he brought into his own moneylending business his share of his assets including rubber estates which he obtained from the other joint Hindu family. The result was that he set up a separate business of his own.

The defendant is Arunasalam Chettiar's elder son by his first wife Lakshmi who died in 1922, and the plaintiff is his younger son by his second wife Meenakshi. The land in question was purchased at a public auction by Arunasalam Chettiar in 1934. Before that he was already the owner of about 100 acres of rubber lands. In order to avoid the Rubber Regulations which were applicable to owners of rubber lands of over 100 acres, he had the said land registered in the defendant's name on March 8, 1935, although he retained control over the land and received income from it which was entered into his accounts.

In 1949 relations between the Karta and the defendant became strained, as the karta claimed that the assets of the PL. AR. business belonged to him exclusively. This resulted in the defendant filing a suit in 1950 (O.S. No. 70 of 1950) against the karta, the plaintiff and Meenakshi in the Court of the Subordinate Judge at Devakottai, India in relation to his share in his father's property.

In 1950 the Karta filed Civil Suit No. 62 of 1950 in the High Court at Seremban against the defendant claiming a retransfer to him of the 40 acres which he had transferred to the defendant in 1935. The basis of his claim was that he had transferred the 40 acres to the defendant in trust for himself. The defendant disputed the Karta's claim denying that the Karta had transferred the 40 acres to him in trust. He alleged that he had in fact purchased the 40 acres from the Karta for a sum of $7,000 on February 27, 1935. He further alleged in his statement of defence that before the date of the transfer, the 40 acres were registered in the name of the Karta but that they were held by the Karta in trust for the joint Hindu family in which the Karta, the defendant and the plaintiff were coparceners.

In 1951 the defendant filed Civil Suit No. 34 of 1951 in the High Court for a declaration that he had an interest in the PL. AR. firm in Port Dickson as a member of the joint Hindu family consisting of himself, the karta and the plaintiff and for partition of assets of the joint Hindu family. In that suit it was agreed by the parties that they would abide by any decree or decision of the Courts of India on the issues arising in O.S. No. 70/50 in the Court of the Subordinate Judge at Devakottai as to whether the PL. AR. firm at Port Dickson and the assets all belonged to the Hindu Joint Family as alleged by the defendant or were the separate property of the karta and the plaintiff as claimed by them. As a result of this agreement the Seremban High Court ordered that all further proceedings in Civil Suit No. 34 or 1951 be stayed until the final determination of O.S. No. 70 of 1950 in the Indian Courts.

As regards Civil Suit No. 62 of 1950 for the return of the 40 acres, the karta was successful in the

High Court as well as on appeal in the Supreme Court, but upon further appeal to the Privy Council the karta's claim to the 40 acres failed on the ground that he had practised a deceit on the public administration. The 40 acres thus remained registered in the name of the defendant.

The suit in India finally ended up in the Supreme Court in India where it was held, *inter alia*, that the PL. AR. Firm in Port Dickson and the assets thereof were the assets of the joint Hindu family consisting of the Karta, the plaintiff, the defendant and Meenakshi and that the defendant was entitled to a third share therein. Shah J. in his judgment observed that with regard to the defendant's claim relating to his share in the assets of PL. AR. Firm in Port Dickson on the footing that it was joint family business, the court was faced with a preliminary difficulty in that the business was carried on in a foreign State, the assets of that business included immoveables and by the rules of private International law no claim may be entertained in a court in India for partition of the immoveables outside the jurisdiction.

In consequence of the judgment and order of the Supreme Court of India, the High Court at Seremban on July 11, 1964 made an order in Civil Suit No. 34. of 1951 that an account be taken of all moveable and immoveable property of the Hindu Joint Family and of the amount due to the defendant as one of the three coparceners in the family. The appeal from that order to the Federal Court was dismissed but as neither the order of the High Court nor that of the Federal Court had specified the date from which the accounting should start there were further proceedings which ended in the Privy Council making the order that the account must be taken from the date of the unequivocal demand for partition made by the defendant by the commencement of his suit on July 15, 1950 (see [1974] 2 M.L.J. 133).

That brings me back to the Civil Suit from which this appeal has arisen. In his statement of claim the plaintiff (respondent) sought a declaration that the transfer of the 40 acres in favour of the defendant (appellant) was void as against himself. He further sought an order for the division of the 40 acres amongst himself, the defendant and the estate of Arunasalam Chettiar or a sale of the 40 acres by public auction and distribution of the proceeds amongst the three parties. The plaintiff also prayed for an order that the defendant do render an account of the income and expenditure arising out of the management of the 40 acres and do pay the plaintiff his share.

No evidence was adduced before the learned trial judge, the parties resting their respective cases on the pleadings and the bundle of agreed documents which in fact consisted of the appeal record in F.M. Civil Appeal No. 34 of 1958 arising from Civil Suit No. 62 of 1950 between the defendant as the appellant and the karta as respondent. It was this appeal which eventually went up to the Privy Council in respect of the 40 acres.

The plaintiff averred in his statement of claim that the decision of the Privy Council holding that the transaction as between the karta and defendant was illegal may be binding on the said karta and the defendant in so far as the karta's one-third undivided share in the said land was concerned, but that the said decision was not binding on him as the said land was joint Hindu family property in respect of which he as coparcener was entitled to one-third undivided share.

It was submitted by Mr. Marjoribanks on behalf of the defendant that, as the 40 acres were registered in the name of the karta at the time of the transfer to the defendant, it was for the plaintiff to prove that they were part of the joint Hindu family property. He said that no evidence had been adduced by the plaintiff to discharge this onus of proof, that there was ample evidence on record to show that the karta claimed the land to be his own private property and that he had transferred it in trust to the defendant to avoid the provisions of the Rubber Regulations of 1934. Moreover, in Civil Suit No. 62 of 1950 the karta sued the defendant in his private capacity and not in his capacity as karta of the joint Hindu family, alleging that he transferred the 40 acres in trust and that the beneficial interest in the land was always vested in himself.

Mr. Marjoribanks conceded that in Civil Suit No. 62 of 1950 the defendant had pleaded that the 40 acres were the assets of the Hindu Joint Family, but he argued that this averment was rejected by the trial judge. He next submitted that if it was held that the 40 acres were assets of the joint Hindu family, then the judgment of the Privy Council was binding on the plaintiff as being *res judicata*. He lastly submitted that if it was held that the 40 acres were assets of the joint Hindu family and that the Privy Council decision was not binding on the plaintiff, then the plaintiff's claim was barred by limitation under section 9 of the Limitation Ordinance 1953.

Mr. Atma Singh Gill for the plaintiff submitted that the 40 acres were the assets of the Hindu Joint Family and not the separate property of the karta. In this connection he referred to the defence filed in Civil Suit No. 62 of 1950 wherein the defendant had made an admission that the 40 acres were held in trust for the Hindu Joint Family in which the karta, the plaintiff and the defendant were coparceners. He further submitted that the Privy Council decision on appeal in that suit was not binding on the plaintiff and that the transfer of the 40 acres by the karta to the defendant in 1935 was invalid as not having been made for the benefit of the joint family. He next said that during the hearing of Civil Suit No. 62 of 1950 the parties had agreed to accept the decision of the Indian Courts in relation to properties in Port Dickson which together with the family property in India were the subject matter of the suit in India, and that the Indian Supreme Court had declared that the PL. AR. Firm at Port Dickson was not the sole-proprietorship of the karta but belonged to the joint Hindu family. On the question of limitation, he submitted that the plea could not succeed because of section 22(1)(b) of the Limitation Ordinance as regards recovery of trust property by a beneficiary.

After considering the evidence and the submissions made on behalf of the parties the learned judge

came to the conclusion that there was ample evidence to establish that the 40 acres formed part of the assets of the joint Hindu family firm of PL. AR. and that they were not a separate property of the karta. In this connection he made reference to the civil suit in the High Court at Seremban in which the parties had agreed to abide by the decision of the Supreme Court in India. The learned judge has set out lengthy passages from the judgment of the Supreme Court in India, but I do not think it necessary to go into that judgment. He pointed out that the defendant's stand in this case was diametrically opposed to the stand which he took in Civil Suit No. 62 of 1950, and he took the view that the ultimate decision of the Privy Council in that case did not operate as *res judicata* against the plaintiff, because all that the Privy Council held was that the karta was not entitled to the retransfer of the 40 acres to himself because he had based his claim on an illegal act by virtue of the deceit practised on the public administration. He next pointed out that the doctrine of *res judicata* can operate only where the parties are the same and the issues between them are the same or essentially the same as those in the first proceedings. He further pointed out that the Privy Council had in no way adjudicated upon the question of any right to the 40 acres by the joint Hindu family of PL. AR. On the question of limitation he agreed with the submission made by Mr. Atma Singh Gill. In the result he pronounced the judgment making the declaration and the orders from which this appeal has been brought.

The appeal is based on six separate grounds which are set out in the memorandum of appeal. Counsel for the appellant, Mr. A.D. Rajah, delivered written submissions to the court which dealt with all the grounds. I do not think it necessary to paraphrase them. The points which the learned counsel made may be summarised as follows. The learned judge was wrong in relying on the judgment of the Supreme Court in India, especially when it was not produced and admitted in evidence. The learned judge was also wrong in treating as evidence the pleadings, and especially the admissions by the appellant, in Civil Suit No. 62 of 1950. The agreement in Civil Suit No. 34 of 1951 cannot apply to the present case because the land which is the subject matter of this suit was not one of the lands in dispute in that case, litigation about it having started earlier. A karta transferring property without the consent of the coparceners loses his share and can only transfer his share and not that of his coparceners. The karta is bound by the decision of the Privy Council at least in so far as his one-third share in the 40 acres is concerned. There was no evidence that the karta held the 40 acres in trust for the joint Hindu family, nor had it been proved that the 40 acres is being held by the appellant in trust for the respondent, so that the action is statute-barred. The respondent had filed this action in his personal capacity and not as executor of the karta's estate, so that the learned trial judge had no jurisdiction to order that one-third share be added to the schedule of the assets of the karta's estate. Even assuming that the action was filed by the executor on behalf of the estate, he cannot maintain this action until a grant of probate is issued to him.

The points made by counsel for the respondent were as follows. The land in question could not be included amongst the lands in dispute in Civil Suit No. 34 of 1951 because it had already been the subject matter of a separate litigation. The parties agreed to abide by the decision of the Supreme Court in India and on that basis the instant appellant signed judgment against the karta in respect of his one-third share. In paragraph 2 of his Statement of Defence in Civil Suit No. 62 of 1950, the present appellant admitted that the land comprised in Certificate of Title No. 4246 (the land in question in this suit) was held by the father in trust for himself and the parties to this appeal. The appellant gave no evidence in Civil Suit No. 62 of 1950 to substantiate his story that he paid $7,000 for the transfer. The trial judge in that case in fact accepted the story of the father that no money had been paid for the transfer of the land. Taking all these things into consideration the property was undoubtedly the property of the Hindu Joint Family. Even if the karta could not get his share of the land for himself, his estate can, because the whole of the land is now held by the appellant for the entire joint Hindu family of which the appellant is only one of the coparceners.

In my judgment, the answer to this appeal is fairly simple. As I have stated earlier, the parties in this case rested their respective cases on the pleadings and an agreed bundle of documents consisting of the appeal record in F.M. Civil Appeal No. 34 of 1958 which contained the complete record of the pleadings, the notes of evidence and the judgment in Civil Suit No. 62 of 1950. I do not think therefore that the learned trial judge was wrong in relying on those documents. The judgment of the Supreme Court in India was only relevant to the extent that in pursuance of it, by consent of the parties, an order was made in Civil Suit No. 34 of 1951 that the entire property of the PL. AR. Firm in Port Dickson belonged to a joint Hindu family of which Arunasalam Chettiar was the karta and the parties to the present suit were his coparceners. The land in question may or may not have been referred to in Civil Suit No. 34 of 1951 but it was one of the assets which were held in the name of Arunasalam Chettiar like the rest of the assets of the firm of PL. AR. Indeed the land in question had already been the subject matter of litigation in the earlier suit. All that the Privy Council decided in the earlier suit was that the transfer of this particular piece of land by the father to the son was illegal, so that the father was not entitled to have the property re-transferred to him.

I do not think I need consider the argument on behalf of the respondent that even if the karta could not get back his one-third share in the land if he were alive, his estate is entitled to it, even though there seems to be no logic in that argument, because the respondent brought this action in his personal capacity and not as representative of the estate of Arunasalam Chettiar deceased. The only question, therefore, which has to be decided in this case is whether the respondent as one of the coparceners can recover his one-third share.

On the authorities, the answer to that question is in the affirmative. As stated by *Mulla* on Hindu Law

(14th Edn.) at page 336, paragraph 268, where a member of a Joint Family governed by the Mitakshara Law sells or mortgages *more than his own interest* in the Joint Family property, the alienation not being one for legal necessity or for payment by a father of an antecedent debt, the other members or persons to whom their interest in the property have passed, are entitled to have the alienation set aside *to the extent of their own interest therein.* In this case the karta transferred the whole of the land to the appellant who is entitled to retain his own one-third share in the property and may or may not be entitled to retain the deceased karta's share, but he is certainly not entitled to retain the one-third share which rightly belongs to the respondent as the third coparcener.

With regard to the learned trial judge's decision as to the karta or his estate being entitled to one-third share in the land, with respect, there would appear to be no alternative but to set it aside in the present case.

For the reasons I have stated I would allow the appeal to the extent that the reference in the learned trial judge's declaration to the karta or his estate be deleted, that the consequential orders be amended to provide for sale of the land by public auction and payment out of the proceeds of sale of the respondent's one-third share, but that the orders for accounts and inquiry do stand. In all the circumstances of the case the respondent must pay one-third of the appellant's costs of this appeal and in the court below.

Syed Othman F.J. and **Abdul Hamid J.** concurred.

Order accordingly.

Solicitors: *Lovelace & Hastings; Gill & Tang.*

PUBLIC PROSECUTOR v. NG GOH WENG & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman, Chang Min Tat and Syed Othman F.JJ.) September 7 and October 10, 1978]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1978]

Criminal Law and Procedure — Preliminary Inquiry — Admissibility of statement recorded under s. 113 of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether preliminary inquiry a trial — Whether duty of Magistrate to decide as to its admissibility — Evidence Act, 1950, s. 26 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 113, 138, 139, 140 and 173.

Evidence — Admissibility of confession to police officer — Criminal Procedure Code (F.M.S. Cap. 6), s. 113 — Evidence Act, 1950, s. 26.

The three accused in this case were tentatively charged with murder and a preliminary inquiry was held before the Senior President of the Sessions Court in Penang. A cautioned statement by the third accused to a Police Inspector was admitted at the preliminary inquiry. On application by counsel for the third accused the learned judge of the High Court called for the record of the case and after hearing arguments he ruled that the cautioned statement was not admissible at the preliminary inquiry although it would be admissible at the trial in the High Court, ([1978] 2 M.L.J. 74). The Public Prosecutor applied to the High Court to reserve the following questions of law for the decision of the Federal Court —

1. Whether a statement recorded in accordance with section 113 of the Criminal Procedure Code which was intended to be produced at a trial before the High Court in support of the case for the prosecution was in law admissible at the preliminary inquiry?
2. If the answer to question 1 was in the affirmative, whether it was the duty of the Magistrate in law to decide on its admissibility.

Held: (1) the answer to the first question was in the affirmative. The context in which the word "trial" was used in section 113 of the Criminal Procedure Code requires that the court should give it an extended meaning to include a preliminary inquiry. It is absurd to suppose that evidence inadmissible at a preliminary inquiry was admissible in a trial before the High Court. *A fortiori* evidence admissible at a trial was admissible at a preliminary inquiry;

(2) if clearly the statement recorded under section 113 of the Criminal Procedure Code was made to an officer below the rank of Inspector, then the duty of the committing Magistrate was easy — he could simply reject it. But if the voluntariness of the statement were challenged and in the unlikely event of the accused's counsel persisting in having a trial within a trial, the learned Magistrate's duty was to listen patiently to the evidence and submission by both sides, and if there were doubt as to the weight and quality of the evidence, he should refrain from assessing the evidence and instead simply commit the accused and leave the duty of resolving the doubt to the High Court judge.

Cases referred to:-

(1) *Re Low Kuan Meng* [1962] M.L.J. 265.

(2) *Re Osman bin Abdullah* [1954] M.L.J. 237.

(3) *In re Bai Parvati* (1911) I.L.R. Bom. 163, 168.

The following case was also cited in argument: *Liew Wah Ming* v. *Public Prosecutor* [1963] M.L.J. 82.

FEDERAL COURT.

Haidar bin Mohamed Noor (State Legal Adviser, Penang) for the Public Prosecutor.

Karpal Singh for the 1st respondent.

R. Rajasingam for the 2nd respondent.

Subash Chandran for the 3rd respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The three accused were tentatively charged with murder. A preliminary inquiry was held before the learned Senior President of the Sessions Court, Georgetown, Penang, sitting as a Magistrate on November 28, 1977. During the inquiry the prosecution produced a cautioned statement which was alleged to have been made by the third accused to a Police Inspector and which was recorded in writing. Counsel for the third accused objected to the production of the statement on the ground that the statement, though admissible at a trial, was inadmissible at a preliminary inquiry. The learned President ruled on December 14, 1977, that the statement was admissible and admitted it.

On application by counsel for the third accused, the learned judge called for the record of the proceedings and on December 16, 1977, using his revisionary power under section 35(1) of the Courts of Judicature Act, 1964, heard arguments from counsel including the learned Deputy Public Prosecutor and ruled that under section 113 of the Criminal Procedure Code the cautioned statement was not admissible at the preliminary inquiry, though it was admissible should he be subsequently tried in the High Court. He held that the word "trial' in that section